

1916147 (Migration) [2023] AATA 3779 (20 October 2023)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Mr Dushan Nikolic
CASE NUMBER:	1916147
MEMBER:	Anne Grant
DATE:	20 October 2023
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa: • cl 801.221(6)(b) and (c) of Schedule 2 to the Regulations

Statement made on 20 October 2023 at 9:53am

CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing relationship before relationship ceased – validly married – financial, household and social aspects of relationship and nature of commitment – volatile relationship with periods of living separately – subsistence lifestyle and low-cost accommodation – sponsor did not inform Centrelink of marriage – physical and mental health, and miscarriages – supporting statements and photos – non-judicially determined claim of family violence – verbal, physical, sexual and financial abuse – statutory declaration, reports from specified practitioners and witness statements – allegations of identity fraud and assault against third party not relevant and given no weight – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), rr 1.15A(3), 1.23(10), 1.24, 1.25, Schedule 2, cls 801.221(2), (6)(b), (c)(i)

CASE

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 31 May 2019 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 15 August 2014 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The primary criteria must be satisfied by at least one applicant. Relevantly to this matter the primary criteria include cl 801.221 which requires the applicant to be the spouse or de facto partner of the sponsor, unless the relationship has ceased and certain circumstances exist. These include that the applicant, or a member of the family unit, has suffered family violence committed by the sponsor: cl 801.221(6)(b), and 801.221(6)(c)(i). The applicant claims these clauses apply in her case.
4. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl 801.221 because they found that the applicant and sponsor were not spouses – that is they were not in a genuine, committed and continuing relationship. At that time the applicant had not raised a claim of having suffered family violence perpetrated by the sponsor.
5. The applicant appeared before the Tribunal on 31 August 2023 to give evidence and present arguments. The applicant was represented in relation to the review. The representative attended the Tribunal hearing.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. At the time of the delegate's decision, the issue was whether the applicant and sponsor were spouses at the time of decision. The delegate found that they were not, relying on concerns they had (among others) about the applicant and sponsor actually living together at all in 2019 when the decision was made. The application for review was lodged on 20 June 2019.
8. The applicant's representative notified the Tribunal on 1 May 2023 that the relationship had broken down and that the applicant claimed to have suffered family violence perpetrated by the sponsor. In subsequent documents lodged in support of a non-judicially determined claim of family violence, the visa applicant has claimed that the relationship ended in May 2019. The issues before me in this review are therefore whether the applicant and sponsor were in a married relationship that has ceased, and if so, whether the applicant has suffered family violence committed by the sponsoring partner while the relationship was continuing.
9. The combined partner visa application was lodged on 15 August 2014. The applicant and sponsor gave their address at that time as (number provided) [Street 1, Suburb 1]. At the time of application, the visa applicant and sponsor provided the following documents to the Department in support of their application:
 - Form 888 witness statement from [Ms A], the visa applicant's friend, dated 15 August 2014, in support of the relationship. The deponent claimed to have met the applicant

only one year ago, and the sponsor about six months later. [Ms A] says that she believes the relationship is genuine based on seeing the couple regularly;

- Form 888 witness statement from [Ms B], the visa applicant's friend, dated 14 August 2014, in support of the relationship. The deponent states that she met the applicant about one year previously and her partner about six months later. She believes that the relationship is genuine;
- Letter from [Dr C] (GP) dated 10 April 2014, confirming the visa applicant is approximately 6 weeks pregnant;
- Marriage certificate issued by the Registry of Births, Deaths & Marriages Victoria, confirming applicant and sponsor married [in] March 2014. The service was solemnised by [D] at [Venue], Melbourne;
- Decorative marriage certificate, confirming the applicant and sponsor married [in] March 2014;
- Sponsor's Australian Citizenship certificate and passport, confirming he was born on [Date] and his Australian nationality;
- Photos of applicant and sponsor spending time together as a couple;
- Clinical report from radiology Dr [E] (radiologist) dated 25 January 2013, regarding the sponsor's [Body parts 1 and 2] pain (medical condition). This report includes the sponsor's address as (number supplied) [Street 2, Suburb 2];
- Medical report from Dr [F] (neurosurgical registrar) regarding the sponsor's medical condition, dated 26 March 2014. This report also provides the sponsor's address as [Street 2, Suburb 2];
- Medical reports from [Mr G] (neurosurgeon) regarding the sponsor's [Body part 1] pain and [associated] pain, dated 30 July 2014 and 30 April 2014. [Mr G] gives the sponsor's address as (number supplied) [Street 2, Suburb 2];
- UNICEF article "Overview - Kenya at a glance – situation of children and adolescents", extracted from their website on 11 May 2015;
- Undated letter from [Bank 1] addressed to the sponsor at [Street 1, Suburb 1] and including a new keycard;
- Visa applicant's payslip history up until 28 January 2015;
- Form 888 witness statement from [H], the sponsor and applicant's friend, dated 20 April 2015, in support of the relationship. The deponent notes that they treat each other well and respectfully, and are a happily married couple. The deponent states that 'They will be very loving and caring parents to their baby.';
- Appointment letter for outpatient services at [Hospital] for the sponsor, dated 29 January 2015. Gives the sponsor's address as (number provided) [Street 2, Suburb 2];
- Medical report from [Mr G] (neurosurgeon) regarding the treatment of sponsor's medical condition, dated 27 August 2014;
- Incomplete copy of lease agreement for a rental property at [Street 1, Suburb 1], for the period of 8 January 2014 to 7 January 2015. The lease agreement does not say whether rent is weekly, fortnightly, monthly etc. It is signed by the applicant and sponsor as well as the landlord;
- Sponsor's statement dated 27 April 2015. In summary, he states that he and the visa applicant met at a mutual friends' party in [Suburb 3], Victoria on 2 April 2013 and exchanged numbers. They started to see each other, and he realised he wants to spend the rest of his life with the visa applicant. He proposed to the visa applicant on 14 February 2014 at their favourite [restaurant]. They married [in] April 2014 surrounded by close friends. Family members could not attend as they lived overseas and it was too expensive to travel. The sponsor injured his [Body parts 1

and 2] 4 years prior. The injury meant he could not work and had to rely on welfare. He is constantly on pain medication and at times, on antidepressants.

The visa applicant works to provide financial support, takes care of him, cooks, and cleans. After their wedding, they conceived a baby together but suffered a miscarriage. This was so hard on the sponsor he fell into depression but through courage and support of each other, they coped and are expecting a child again. He states they wish to spend their lives together and support each other, and that the visa applicant gave him strength as he would not know how to cope without her. He states that the applicant is pregnant again;

- Visa applicant's statement dated 27 April 2015. The statement contains similar information as the sponsor's, from the view of the visa applicant;
- Visa applicant's Kenyan passport, showing she was born on [Date];
- National police certificate issued by the Australian Federal Police dated [May] 2015, confirming there are no disclosable court outcomes against the visa applicant's name;
- Kenyan police clearance certificate dated [July] 2015, confirming there are nil offences recorded against the visa applicant;

10. On 21 June 2016, the Department wrote to the applicants requesting information for the assessment of the second stage of the partner visa application. The visa applicant and sponsor provided the following documents to the Department in support of their application:

- Photos of the visa applicant and the sponsor spending time together;
- Greeting card addressed to the parties, regarding their marriage;
- Sponsor's [Bank 1] EFTPOS cards;
- Form 888 witness statement from [Ms I], the visa applicant's friend, dated 25 August 2016, in support of the relationship. [Ms I] states that she believe that the relationship is genuine and they are planning to have a family together. They are saving up to buy a house;
- Marriage certificate, issued by the Registry of Births, Deaths & Marriages Victoria, confirming both parties married [in] March 2014. The service was solemnised by [D] at [Venue], Melbourne;
- Sponsor's Australian Citizenship certificate and passport, confirming he was born on [Date] and his Australian nationality;
- Form 888 witness statements from [Ms J], fellow church member of 3 years, dated 24 September 2016, in support of the relationship. The deponent states that she sees the applicant and sponsor at least twice a month and that she believes that their relationship is genuine and continuing;
- Medical certificate from [Dr K] (GP) dated 6 March 2019, stating the sponsor is unfit for his normal occupation on 6 March 2019. This gives his address as [Street 1, Suburb 1];
- Patient Declaration dated 6 March 2019, stating the sponsor he was ill on 5 March 2019 but was not seen by a doctor;
- Sponsor's prescription dated 6 March 2019, for an over the counter product, by his GP giving address in [Street 1, Suburb 1];
- Form 888 witness statement from [Ms L], the visa applicant's friend of 15 years, dated 11 April 2019, in support of the relationship;
- Form 888 witness statement from [Ms M], friend of visa applicant, dated 11 April 2019, in support of the relationship;
- Form 888 witness statement from [N], friend of the sponsor, dated 10 April 2019, in support of the relationship;

- Sponsor's health care card, stating he resides at [Street 3, Suburb 3];
- Medicare letter addressed to the visa applicant, at [Street 3, Suburb 3];
- Sponsor's referral form for patients with a chronic medical condition, listing his address as [Street 2, Suburb 2], signed 31 August 2018;
- Medical report from [Dr O] (GP) dated 6 April 2018, addressed to the sponsor at [Street 2, Suburb 2];
- Certificate of physiotherapy appointments attendance by the sponsor for the period August to September 2018;
- [Bank 1] account list of transactions for [account], in the name of the visa applicant, addressed to [Street 3, Suburb 3] for the period January to April 2019;
- [Bank 2] account interim statement for [account], in the name of the sponsor for the period February to April 2019, showing the deposits of Centrelink benefits;
- Sponsor's statutory declaration dated 11 April 2019. In summary, the sponsor states he and the visa applicant declared each other as spouses to Centrelink, ATO, and their Superannuation fund. He has been applying for public housing for himself, the visa applicant and his children from his previous relationship since 2009 as he is unable to pay for rent. They signed a lease together at [Street 1, Suburb 1] in 2014. This is a student accommodation and the sponsor stayed there with her because his was a male boarding house, and there were strict rules imposed for long term accommodation. He states that the parties moved to [Street 3, Suburb 3] from September 2018, where they still currently live. He has chronic health conditions which sometimes causes him to stay in bed for days and sometimes weeks, it makes hard to live a normal life. He regrets what he said to the Department case officer over the phone as he made errors because he was at his lowest mental and physical state on that day. He takes medication for his chronic [Body part 1] pain which probably affected his mental state. He explains that he was confused, stressed and frustrated when the case officer spoke to him. Afterwards, they contacted the case officer several times. He states he loves the visa applicant so much and would be devastated without her. The visa applicant is working and helping with his Centrelink debt. Without her, he would be financially crippled;
- Visa applicant's statutory declaration dated 11 April 2019. This statement is similar to the sponsor's statement, from her view;
- Sponsor's Australian Citizenship certificate and passport, confirming he was born on [Date] 1966 and his Australian nationality;
- Visa applicant's prescription for Maxolon, dated 23 April 2019;
- Visa applicant's pathology test order for the test of hCG – Quantitative (pregnancy test), dated 23 April 2019;
- Letter from [Dr K] (GP) dated 23 April 2019 confirming she presented to the medical clinic due to a positive pregnancy test.

11. On 30 April 2023, the applicant provided the following information to the Tribunal;
 - Visa applicant informed her relationship with the sponsor has broken down, that she has suffered family violence committed by the sponsor, and seeks to rely on non-judicially determined evidence to support her claims.
12. On 20 June 2023, the applicant provided the following documents to the Tribunal in support of her application for review:
 - [Bank 1] bank statement for [account], in the name of the visa applicant, addressed to [Street 1, Suburb 1], for the period 23 January to 7 February 2015;

- [Bank 1] account list of transactions for [account], in the name of the visa applicant, addressed to [Street 1, Suburb 1] for the period March 2015 to August 2016;
- Sponsor's [Bank 1] EFTPOS cards;
- Visa applicant's [superannuation] account nominating the sponsor as sole beneficiary. This nomination is non-lapsing;
- National police certificate issued by the Australian Federal Police dated [August] 2016, confirming there are no disclosable court outcomes against the visa applicant's name;
- Doctor progress notes collated on 17 August 2016 from multiple doctors regarding the visa applicant's medical history, recorded by a medical practice in [Suburb 1];
- Medical certificates and prescription for an over-the-counter product in the name of sponsor;
- Letter from a GP confirming the visa applicant's pregnancy, dated 23 April 2019;
- Photos of parties spending time together;
- Form 888 witness statement from [Ms I], the visa applicant's work friend of 2 years, dated 25 March 2016, in support of the relationship;
- Form 888 witness statement from [Ms J], fellow church member, dated 24 September 2016, in support of the relationship;
- Statutory declaration from the sponsor dated 17 August 2016, stating that he continues to be in an ongoing, committed, genuine and exclusive relationship with the visa applicant;
- Submissions from the representative dated 20 June 2023, addressing the various criteria of the visa, including the information regarding the breakdown of the relationship between the parties;
- Witness statement from [Ms P], the visa applicant's friend of 10 years, confirming the genuineness of the relationship prior to it breaking down, dated 20 June 2023.

13. On 28 July 2023, the applicant provided the following documents to the Tribunal in support of her application for review:

- Legal submissions from the representative dated 28 July 2023, regarding the visa applicant's family violence claims;
- Form 1410 statutory declaration from the applicant, detailing her relevant family violence claims, dated 26 July 2023. She describes the sponsor striking her to the face at a bus stop in November 2015. [This date has been corrected in subsequent information and at hearing correctly being April 2015]. This was the first act of family violence. She describes sexual abuse and verbal abuse throughout 2015, 2016 and 2019, and how she would seek refuge at a friend's house until things had 'settled down'. She also describes how he would withdraw money from her bank account to send to his family without her agreement and direct his friends to monitor her conduct and behaviour when he could not. She describes how she now has a general fear of men, and specifically from the sponsor as a threat to her well-being. She has developed depression and anxiety;
- Psychologist report from Psychologist [Ms Q], [Psychology], dated 16 June 2023. In summary, [Ms Q] opines that the visa applicant was a victim of chronic domestic violence perpetrated by the sponsor over the course of the relationship, characterised by controlling and abusive behaviour.
- Medical report from [Dr R], GP, dated 23 July 2023. [Dr R] reports that the applicant had reported domestic violence issues including physical and sexual assault and that she had separated from the sponsor in May 2019. According to this letter, the applicant had advised the doctor that all abuse happened during the marriage and

she has had no contact since separation. The doctor refers to a mental health plan in place and referral to a psychologist, and current symptoms of poor sleep, anxiety and a low mood.;

- Mental health plan and GP referral letter from [Dr S] dated 16 June 2023. [Dr S] confirms that the applicant presents with low mood and likely alcohol overuse/dependence 'in the setting of previous abusive relationship and legal issues relating to her residency status. She has been struggling due to this past relationship and dealing with grief after losing her mother in Africa';
- Witness statement from [Ms M], the visa applicant's friend, confirming the genuineness of the relationship prior to it breaking down, dated 21 July 2023;
- Witness statement from [Ms P], the visa applicant's friend, confirming the genuineness of the relationship prior to it breaking down, dated 20 June 2023.

14. On 25 August 2023, the applicant provided the following documents to the Tribunal in support of her application for review:
- Representative's written submissions dated 25 August 2023, clarifying the living arrangements between the visa applicant and sponsor, the dates of family violence and addressing the dob-in information received by the Department;
 - Written statement from the visa applicant dated 25 August 2023;
 - Threatening email trail and text messages exchanged between the visa applicant and a third party [Mr T].
 - Email trail exchanged between the visa applicant, Victoria Police, and Legal Aid.

Whether the applicant and sponsor were in a spouse or de facto relationship

15. In the present case, the applicant claims that the relationship with the sponsor has ceased, and she has been the victim of family violence. The prior existence of a spouse/de facto relationship that has ceased is a precondition to an assessment of whether the family violence provisions can apply.
16. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Were the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. Evidence has been provided that the applicant and sponsor married at the [Venue] on [March] 2014. There is no information before me which suggests that either the applicant or sponsor had any impediment to a lawful marriage. The marriage has been registered in Victoria. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

18. The applicant was granted a subclass 820 visa on 21 August 2015. The delegate was not satisfied that the visa applicant and sponsor were in a married relationship at the time of making the decision in 2019. A perusal of the delegate's decision discloses that the delegate was concerned that the sponsor had informed them that the relationship had ended in 2015 'when the applicant had returned to Kenya', and with several discrepancies between the address history given by the applicant and sponsor.
19. In my view, the grant of an 820 visa does not necessarily establish that the parties were in a genuine and continuing relationship, though it does suggest that the decision maker at that time was sufficiently satisfied with the various aspects of the relationship in 2015 to find that the visa applicant satisfied cl 820.211(2).
20. The evidence before me suggests a volatile and unsettled intimate relationship between the visa applicant and the sponsor. Because of that volatility, and evidence given by the visa applicant herself at hearing (and in a statutory declaration) about the parties living separately for periods even around the time of the grant of the 820 visa, I consider it is appropriate for me to revisit the relationship from the date of marriage and satisfy myself that the visa applicant was the spouse of the sponsor for some period, before I can decide that the relationship has subsequently broken down. In order to make that assessment, I have (as required by regulation 1.15A,) had regard to the various aspects of the relationship, as discussed below.
21. The parties claim to have met in April 2013, at a party. As noted earlier, they have provided evidence of a valid marriage on 6 March 2014.
22. **Financial aspects of the relationship - including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.**
23. According to the paperwork submitted by the applicant and her evidence at hearing, the parties did not have a joint bank account. They each maintained their separate bank accounts into which their personal sources of income were deposited. The applicant worked part time when able to do so, and the sponsor received Centrelink benefits. I accept that the visa applicant paid the rental costs of the property in [Suburb 1] and the sponsor was paying for a room in [Street 2, Suburb 2], even though, as discussed below, they stayed together at various times in both of those properties. There is not significant evidence of a pooling of financial resources in this case. This is not a situation where the parties had significant financial resources which they isolated from each other, or where they each had settled homes, assets and extensive income which they either pooled or kept separate from their marriage partner. Theirs was a subsistence lifestyle with the sponsor on Centrelink benefits and the visa applicant in low paid employment while studying, and where they both had relatively low cost accommodation which was not appropriate for a couple to live in long term. I consider that they each continued to support themselves after the marriage as they had prior to the marriage due to their limited resources.
24. Records on the Departmental file from Centrelink indicate that the sponsor did not inform Centrelink of his marriage, despite his claim that he did so in a declaration tendered as evidence. He continued to receive his benefits and those benefits were available to him, and not to the applicant. The applicant's evidence and the statements made in the process of this review suggests that the sponsor relied on the applicant to offset his low income, including sending money to his family overseas, and that he would sometimes contribute to groceries when they were together. I have not had the opportunity to discuss the sponsor's reasons for not notifying Centrelink of the fact of his marriage to the sponsor, but given his

long term reliance on social security, I consider that there is a real possibility that this was a deliberate choice he made to avoid potentially reducing his income by any factor, rather than proof of a lack of genuine relationship between him and the visa applicant. I accept that the sponsor relied on the applicant to purchase food and contribute to his financial needs, even without her consent on some occasions, when he withdrew money from her personal account to send to his family overseas. The parties had no joint financial assets or liabilities. While the sponsor claims he had a Centrelink debt that the applicant was assisting him with, there is no other evidence capable of supporting this claim and I do not accept it.

25. Consideration of the financial aspects of the relationship suggests that the applicant and sponsor lived together sporadically and shared some living expenses when together - which they met from their independent sources of income, sometimes pooling that money for general living expenses. Otherwise the parties maintained separate financial arrangements. The visa applicant nominated the sponsor as her spouse and beneficiary on her superannuation account, which indicates some intimacy in financial matters between them. Overall, consideration of the financial aspects of the relationship provides only a little evidence in support of there having been an ongoing spousal relationship between the applicant and sponsor after their marriage.

26. Nature of the household - including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.

27. The applicant and sponsor have no shared children, although on the evidence provided as described above, they have reported three separate pregnancies since marriage, which have sadly ended in miscarriage. The sponsor has stated that he had little to do with his children from a prior relationship during their time together. At hearing, the applicant knew their names but said that she rarely saw the children, because she and the sponsor didn't really live in 'child friendly' environments. The sponsor would spend the day with them on contact visits and then return them to their mother.
28. There is some evidence that the visa applicant performed the household chores, including cooking and cleaning, when they lived together because the sponsor had a [Body part 1] condition which prevented him from working, but that he 'helped out when he could.' Although it is claimed in some statements that the sponsor did the gardening, based on my assessment of their accommodation choices over the period since their marriage, I am not satisfied that there was gardening to be done or that he (with his [Body part 1] condition) actually did contribute in that way at any time.
29. In a submission to the Tribunal the applicant and sponsor's living arrangements were described over several years. According to that information, which was confirmed generally by the applicant's evidence at hearing, she and the sponsor lived together after marriage in [Street 1, Suburb 1] from January 2014 to December 2015. The applicant continued living there until October 2016. The sponsor moved back to [Street 2], and later to [Street 3]. From October 2016, the applicant lived in [Suburb 4] but would stay with the sponsor two to three nights per week at [Street 3]. She later moved to [Suburb 5] in October 2018 but continued 'spending time' with the sponsor at [Street 3].
30. I consider that the parties have lived at different addresses from each other at various times since they married. At the time of marriage, the sponsor stated on the marriage certificate that he was living in [Street 2, Suburb 2]. This is a room in a shared home. The visa applicant was renting a student housing property in [Street 1, Suburb 1]. At hearing, she described it as a one bed-room bed-sit. She stated that it was intended for student housing, with one tenant. She gave evidence that the sponsor moved in there with her for a period after their marriage because the 'men only' accommodation in [Street 2, Suburb 2] was an unhealthy and unpleasant environment, where drugs and alcohol abuse was prevalent. He

was on the lease for [Street 1] for a short time and when asked how that could be the case, (in one of her statements she had indicated that he was not 'allowed' to live there as it was student accommodation); the applicant responded that there was a change in ownership and the new owners were stricter about the rules, and he later had to move out. He went back to his room at [Street 2, Suburb 2].

31. The applicant has provided a rental agreement which purports to include the sponsor from 8 January 2014 to 7 January 2015 at the address in [Street 1, Suburb 1]. I accept that the sponsor stayed there (and sometimes for lengthy periods) after their marriage due to it being the better of their two accommodation options available.
32. According to statements by the visa applicant, she continued renting [Street 1, Suburb 1] until late 2016 or early 2017, and the sponsor would come and stay with her there, and she would go to stay with him at [Street 2, Suburb 2]. She did not like his accommodation, so refused to stay long term – in fact she could not, because it was meant to be 'male only' accommodation. She states that there were always drugs and drinking there and it was an uncomfortable and unhealthy environment. According to the applicant's evidence, from 2015, her relationship with the sponsor had changed and become toxic and dysfunctional after the first incident of family violence which took place in April of that year. She gave evidence that things were difficult for her and in 2017, in an effort to move away from the toxic environment in which she and the sponsor lived, she moved to [Suburb 4]. Her evidence and her written statements suggest that whilst living in [Suburb 4] she 'kept in contact' with the sponsor irregularly.
33. According to the applicant, in late 2018, she moved back to live in [Suburb 5] with her friend [Ms L] and at some point to [Street 3, Suburb 3] where she stayed with the sponsor again, though it may be that this move was a temporary move only because it appears, based on her evidence that the relationship with her friend with whom she stayed in [Suburb 5] broke down not long afterwards.
34. Centrelink records show the sponsor notified them that he had moved to [Street 3] in November 2018. Bank statements have been provided addressed to the applicant and to the sponsor at that address. According to the visa applicant, they shared that house (as a couple) with several others. The sponsor has provided a statement that he lived there with the visa applicant. I note that, contrary to his written statement made in 2018, in April 2019 when he spoke to the departmental delegate, the sponsor stated that he had not seen or lived with the visa applicant since 2015 before she travelled to Kenya. Movement records suggest that the visa applicant departed Australia on 4 December 2015 (returning two weeks later) and then again on 10 December 2018, returning on 9 January 2019. I consider the sponsor's claim that they had not been together since 2015 could have been mistakenly referring to the later visit or potentially to be a statement deliberately made with the intention to derail the applicant's visa application. I consider that their relationship had already entered its final stage at the time of the delegate's contact with the sponsor, even if it had not officially ended, and that in the context of a hostile and abusive relationship breakdown with the sponsor, the sponsor's statements to the delegate should not be given undue weight.
35. I consider that the evolution of the relationship between the visa applicant and the sponsor was, just as described by the applicant's representative at hearing, difficult and toxic after 2015 and was characterised by unstable accommodation, extended periods of separation followed by reconciliations (and repeats of this pattern) until around May of 2019. I have noted that the sponsor's medical certificate provided after the failed departmental interview gives the sponsor's address as [Street 1, Suburb 1] in April 2019 – when the applicant had not rented that address since around 2016. I consider the medical letter and prescriptions do suggest nonetheless that the doctor who made the report in 2019 had been given that address as the sponsor's home address at some point previously. This medical information

therefore adds some weight to the applicant's case suggesting they lived together for a period in [Street 1] and it also indicates that the applicant and sponsor were still in contact with one another in 2019, in spite of what he told the delegate on the day of interview, because it was produced as evidence in her application.

36. Having considered the evidence before me, I find that the visa applicant and sponsor lived together in the applicant's [Street 1] Accommodation and also stayed together in the sponsor's [Street 2] accommodation after they married until around 2017. I also accept that they stayed together on an ad hoc basis for some period (with others but as a couple) in [Street 3, Suburb 3] during part of 2018 and until around April or May of 2019. I consider that, at the time the delegate rang the sponsor, they had already ceased living together full time and, whilst still in some contact, the relationship was effectively at an end. Because of the nature of their lifestyle, I cannot be specific about the timing; but there is sufficient information suggesting that both the applicant and sponsor had given [Street 1, Suburb 1] as their address over a period of several years to banks and doctors; and also the [Street 3] address to various external entities such as [Bank 2], Centrelink and medical organisations during 2018.
37. Consideration of the nature of the households in this case suggests that the parties lived together for some of the period after their marriage up until 2019, but that they also spent lengthy periods living separately due to the volatility of their relationship and perhaps also due to the chaotic nature of their domestic environments. The applicant in her most recent letter to the Tribunal suggests that she still saw the sponsor irregularly and that they 'kept in touch', even describing it as maintaining contact 'through occasional meetings' over 2017 and 2018. She confirmed this at hearing.
38. Nonetheless, the evidence suggests and I am satisfied that in periods where they were living together, the sponsor relied on the visa applicant for day to day support in the form of cooking and cleaning due to his [Body part 1] condition and mental health. I give the nature of their households a little weight towards the applicant and sponsor having been in a married (unsettled and volatile) relationship.
39. **Social aspects of the relationship - including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.**
40. A number of supporting witness statements have been provided which indicate that the visa applicant and sponsor presented themselves as and were considered to be a married couple in their social circle. I consider that I must take into account the nature of the social circle in which this couple moved, which appears to have been an insecure, volatile and troubled one. The applicant described at hearing how she is estranged now from at least two of the people who made statements in support of the relationship, and that she was for a brief period after the end of the relationship with the sponsor, in a relationship with a person who later made fraud allegations against her. I consider that the applicant and sponsor's social and married life was affected by their unstable and difficult living situation, in environments involving drug and alcohol abuse. Nonetheless, there is evidence from friends of the applicant and sponsor that they were regarded as and represented themselves to be a married couple, and in a genuine and committed relationship. There is some photographic evidence of them socialising together. Consideration of this aspect of the relationship will be accorded a little weight towards the applicant and sponsor having been in a married relationship.
41. **Nature of persons' commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship**

and emotional support they draw from each other; and whether they see the relationship as long-term.

42. The evidence before me (including the applicant's statement made reporting family violence) suggests that despite a toxic and difficult relationship, and several periods of separation, the applicant was committed to the sponsor and to their relationship until it finally came to its' end in 2019. I have had regard to the evidence provided about three pregnancies during the course of the relationship, the first of which occurred shortly after their marriage. I give significant weight to this first pregnancy as an indicator of their mutual commitment to each other at that time. The information and evidence before me suggests and I accept that both the applicant and the sponsor were devastated by the first miscarriage in particular. Because of the lengthy separations and reconciliations, I give less weight to the subsequent pregnancies as indicators of a level of commitment between the applicant and sponsor because in those periods, I consider that their relationship was intermittent at best.
43. There is also evidence that the visa applicant emotionally and practically supported the sponsor who had a chronic pain condition throughout the relationship, by providing domestic care and accompanying him to medical appointments as needed. Consideration of the nature of the applicant and sponsor's commitment to each other suggests that there have been periods during which the parties considered themselves to be in a genuine, committed and long-term relationship.
44. **Any other circumstances of the relationship.**
45. In this case, an allegation has been made that the visa applicant and sponsor perpetrated an identity fraud on a person, described herein as [Mr T]. In making the allegation, [Mr T] specifically stated that he did not seek to remain anonymous. According to [Mr T]'s allegation, the applicant and sponsor had used his identity details and forged a letter to 'justify large payments' in the applicant's bank account. The allegation was made on 12 June 2019. Further, another allegation has been made, on 2 June 2019, that the visa applicant assaulted a person (the applicant at hearing confirmed the person assaulted to be [Mr T]), causing him a significant injury requiring [stitches], some two weeks prior to the report. I discussed these matters generally with the applicant at hearing, trying to understand whether any police charges had been laid in relation to either matter. She gave some evidence that the fraud never happened, and she had provided the police bank account statements showing no such large deposits into her account as [Mr T] claimed. She had also given to the tribunal text printouts from [Mr T] to the applicant which were hostile, abusive and repeatedly demanded money and threatened to report her for various, vague matters so that she would be sent back to Kenya.
46. At hearing, she also gave brief evidence about the incident with [Mr T] where he was injured, saying that it occurred at a time when she was grieving the loss of her mother and 'not in her right mind', and where she had thrown a vase at him. However neither she nor her representative appeared to be able to clarify whether she had actually been charged with any offence or would be charged with any offence, despite my having found her name appearing in the [Magistrates' Court] lists as recently as [Specified time period] before our hearing date. Consequently I am unaware of whether the allegations have resulted in any criminal charges against the applicant. I note that the applicant's criminal history is not relevant to my consideration of the nature of her relationship with the sponsor. My enquiry about whether the applicant had been convicted of any charges was simply to clarify whether a finding of fraud had been made against her.
47. I have had regard to the abusive texts sent to the applicant by [Mr T] which have been provided to the police and to the Tribunal. In the context of such a hostile and toxic personal relationship between [Mr T] and the applicant, I consider it would be unwise to place any

weight on the allegation of fraud, made not long after he was injured in an act of violence by (as she admitted) the applicant. In any event, I consider that both of these allegations relate to a period after the applicant's married relationship with the sponsor was at an end, and also when the applicant was involved with [Mr T]. I have chosen to give them no weight in considering the existence or otherwise of the relationship between the visa applicant and sponsor.

48. Conclusion on the spousal relationship

49. The relationship in this case did not follow what may be considered a common or even 'usual' path. I have found that, due to the unsettled living arrangements and troubled personal environments inhabited by both the applicant and the sponsor, they lived apart for lengthy periods from 2016, reconciling on occasion, and living separately on other occasions.
50. I observe that the legislation does not require an unbroken period of cohabitation. It is not expected (or desirable) that a person subjected to family violence remain in an unsafe and unhealthy environment until the very end without interruption, in order to satisfy visa requirements. What is required is for me to be satisfied that the visa applicant and sponsor were, at some point, in a married relationship (as defined by s.5F and after considering the various aspects of the relationship).
51. Based on my assessment of the various aspects of the relationship as discussed above, I am satisfied that the visa applicant and sponsor were in a married relationship and living together from [March] 2014 until at least December 2015, and that the relationship continued until around May 2019, although characterised by frequent and sometimes lengthy separations and reconciliations during the period from mid 2015 until 2019. I am satisfied that the married relationship had broken down finally by around April or May of 2019. I find that the visa applicant was the spouse of the sponsor after their marriage. I am therefore satisfied that she would continue to be the spouse of the sponsor except that the relationship has ceased.

52. Family Violence Claims

53. In the present case the applicant is seeking to establish family violence on the basis of a non-judicially determined claim of family violence, and seeking to satisfy cl 801.221(6)(b) and (c) which provide:
- (6) An applicant meets the requirements of this subclause if:
 - (a) the applicant is the holder of a Subclass 820 visa; and
 - (b) the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and
 - (c) either or both of the following circumstances applies:
 - (i) either or both of the following:
 - (A) the applicant;
 - (B) a dependent child of the sponsoring partner or of the applicant or of both of them;
 - has suffered family violence committed by the sponsoring partner...
54. I find that the applicant would meet the requirements of subclause (2) except that the relationship between the applicant and sponsor has ceased. The applicant satisfies cl 801.221(6)(b).

Has a claim of family violence been made under the regulations?

55. Under reg 1.23, a visa application is taken to include a non-judicially determined claim of family violence where there is no joint undertaking and evidence in accordance with reg 1.24 is provided.
56. The applicant in this case is seeking to rely on evidence referred to in reg 1.24 – namely, a statutory declaration under reg 1.25 and evidence of a type and number specified by the Minister for these purposes. The relevant instrument in this case is the Migration (Specification of evidentiary requirements – family violence) Instrument (LIN 23/026) 2023.
57. According to the relevant instrument, a minimum of two items of evidence mentioned in Schedule 1 must be provided. Schedule 1 includes a medical report or letter from a medical practitioner in their professional capacity which identifies the alleged victim and details the injuries or treatment of the alleged victim that may be consistent with family violence. It also includes a report from a psychologist acting in their professional capacity which states that the alleged victim has made a claim of family violence and that in their professional opinion the claims of the alleged victim are consistent with them having been subject to family violence and identifying the alleged perpetrator.
58. The applicant has provided letters from medical practitioners which describe her as suffering from anxiety and depression and which refer to her having reported being subjected to family violence by her ex-husband. The letters describe treatment in the form of SSRI's and also referral for psychological counselling and I am satisfied that the psychological injury and treatment of the applicant described by the doctors may be consistent with her having experienced family violence perpetrated by the sponsor. I find that the medical letters satisfy the specification in the relevant instrument.
59. The applicant has also provided a psychological report from a psychologist who specifies her address, qualifications, occupation, is dated and signed and provides her phone number. The report states that the applicant has made a claim of family violence perpetrated by the sponsor. It also states that in her professional opinion, the applicant was a victim of chronic domestic violence perpetrated by the sponsor. I am satisfied that the psychological report by Ms Lee complies with the specifications in the schedule to the relevant instrument.
60. A statutory declaration must also be provided under reg 1.25 by the spouse or partner of the alleged perpetrator. If the alleged victim is the spouse or partner, the statutory declaration must set out the allegation of family violence, name the person alleged to have committed the relevant family violence and if the *conduct* was not directed at the spouse or partner, name the person to whom it is directed and their relationship with the deponent: reg 1.25(2). There are different requirements if the family violence is alleged to have occurred to another person: reg 1.25(3).
61. The applicant has provided a statutory declaration in which she outlines having suffered multiple instances of family violence (including physical, sexual, verbal and emotional abuse) perpetrated by the sponsor during a volatile relationship.
62. I conclude that the evidence presented meets the requirements of reg 1.24. As such, a non-judicially determined claim of family violence has been made under reg 1.23.

Has the applicant suffered family violence?

63. The applicant gave evidence consistent with the information relayed in her statutory declaration and as outlined by the psychologist about having experienced physical, sexual, emotional and verbal abuse perpetrated by the sponsor over several years, which abuse led

to periods of separation. I have had regard to the evidence provided about the family violence suffered by the applicant. Subregulation 1.23(10) requires a decision maker to consider and be satisfied that the alleged victim has suffered relevant family violence and if not, to refer the matter to an independent expert. Having considered all of the evidence before me, I am satisfied, for the purposes of reg 1.23, that the applicant has suffered family violence committed by the sponsor. I am satisfied that the family violence occurred while the relationship existed. As such, the applicant is taken to have suffered family violence in the relevant sense: reg 1.22.

64. I am satisfied that the applicant was the spouse of the sponsor and that the applicant would meet the requirements of subclause 801.221(2) except that the relationship between the applicant and sponsor has ceased. I am satisfied that the applicant has suffered family violence perpetrated by the sponsor whilst the relationship was still continuing. Therefore the applicant meets cl 801.221(6)(b) and (c).
65. Given my findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

66. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl 801.221(6)(b) and (c) of Schedule 2 to the Regulations.

Anne Grant
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).